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**NOTICE OF DISPUTE - U.S. EPA DISAPPROVAL OF  
OPERABLE UNIT 3 INITIAL SCREENING OF  
ALTERNATIVES (ISA) REPORT AND U.S. EPA  
NOTICE OF VIOLATION (NOV)**

**01-04-91**

**DOE-535-91  
DOE-FMPC/USEPA  
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LETTER**



JAN 8 1991

Department of Energy

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Mr. David A. Ullrich, Director  
Waste Management Division  
U. S. Environmental Protection Agency  
Region V - 5H-12  
230 South Dearborn Street  
Chicago, IL 60604

Dear: Mr. Ullrich:

**NOTICE OF DISPUTE - U. S. EPA DISAPPROVAL OF OPERABLE UNIT 3 INITIAL SCREENING OF ALTERNATIVES (ISA) REPORT AND U. S. EPA NOTICE OF VIOLATION (NOV)**

- References:
- 1) Letter, DOE-1971-90, A. P. Avel to C. A. McCord and G. E. Mitchell, "Operable Unit 3 - Initial Screening of Alternatives (ISA) Report," dated September 21, 1990
  - 2) Letter, C. A. McCord to B. J. Davis, "Operable Unit #3 Fernald, Ohio OH6 890 008," dated September 10, 1990 #921
  - 3) Letter, C. A. McCord to A. P. Avel, "OU#3 ISA Fernald, Ohio OH6 890 008," dated October 24, 1990 #922
  - 4) Letter, DOE-312-91, A. P. Avel to C. A. McCord and G. E. Mitchell, "Initial Screening of Alternatives for Operable Unit 3," dated November 21, 1990
  - 5) Letter, C. A. McCord to W. D. Adams, "Notice of Violation OU#3 ISA Report U.S. DOE Fernald OH6 890 008 976," dated December 21, 1990 #920
  - 6) Letter, C. A. McCord to A. P. Avel, "OU#3 ISA Disapproval U.S. DOE Fernald OH6 890 008 976," dated December 21, 1990

The United States Department of Energy (DOE) disputes United States Environmental Protection Agency (U. S. EPA) December 21, 1990 disapproval letter of DOE's Initial Screening of Alternatives (ISA) Report for Operable Unit 3 (OU 3) and U. S. EPA's December 21, 1990 Notice of Violation and assessment of stipulated penalties letter. The DOE disputes U. S. EPA's conclusion that the ISA Report was not developed in accordance with the Consent Agreement (CA), Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the National Contingency Plan (NCP) and U. S. EPA

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guidance. DOE also disputes that this alleged failure constitutes a continuing violation for which stipulated penalties may be assessed under the CA. DOE believes the ISA is consistent with the CA, CERCLA, NCP and EPA guidance. The ISA's scope is consistent with the Work Plan reviewed by our agencies and implemented under the schedules in the 1990 CA.

On September 21, 1990, the DOE submitted the ISA Report for OU 3, to the U. S. EPA, as required by the Consent Agreement, Section X.C.3.(Reference 1). The report as presented, addressed the extent of contamination of environmental media (soils and perched water) and its sources (underground pipelines, sumps, rubble piles, scrap metal and cooper piles, buildings, etc.) throughout the Production Area and Additional Suspect Areas and evaluated fourteen (14) alternatives for the remediation of the media and specific sources of contamination. The ISA was developed to address the findings from the Production Area and Additional Suspect Areas Addendum to the Remedial Investigation/Feasibility Study (RI/FS) Work Plan, originally entitled "The Facilities Testing Plan." This was initially submitted to U. S. EPA for review and approval in December 1988. The scope of OU 3 evolved from the 1988 Work Plan Addendum and is consistent with the requirements of CERCLA, the NCP, and relevant EPA guidance.

On August 10, 1988, an FMPC Facilities Task Force, was chartered to identify historic operations at the FMPC which could have resulted in unmonitored discharges to the environment. Potential historic sources were identified and evaluated. This information was compiled to support the development of a detailed sampling program under the Facilities Testing Plan (Production Area and Additional Suspect Areas Addendum). The Facilities Testing Plan was conducted to determine the nature and extent of any existing or potential environmental impacts associated with the FMPC production area or identified suspect areas. The results of this survey identified 137 operations which were suspected of past unmonitored discharges. Forty-two operation facilities were recommended for further investigation using a focused boring program. The rest of these facilities were evaluated through a systematic boring program (grid pattern). Section 5.0 of the Facility Testing Plan Report, clearly stated that existing or potential sources of contamination throughout the production area (including buildings or aboveground structures) can best be determined from the analysis of the soils and perched water obtained from the focused and systematic borings. The final report was transmitted to U. S. EPA, attention Mr. William Muno, on January 11, 1989.

On May 3, 1989, the DOE received comments from U. S. EPA and OEPA on the Facilities Testing Plan. None of the EPA's comments identified the need for additional characterization associated with production area structures, buildings, or materials to evaluate any potential threats of releases. Based on the fact that the whole investigation was focused on drilling borings, and taking samples of soils and perched water to evaluate any existing and potential threats of releases and based on the fact that no comments were made by EPA to suggest expanding the scope of this investigation, the DOE proceeded in good faith with the understanding that U. S. EPA and OEPA were in agreement with the approach.

Two years ago, the scope of the Remedial Investigation for OU 3 was defined without any interior or exterior characterization of the buildings or structures. Today, due to the changing circumstances, additional effort may be

required. However, it is important that U. S. EPA and OEPA understand that the negotiated schedules in the 1990 Consent Agreement were based on the above Work Plan which did not allocate any time to perform this additional level of effort to characterize buildings, aboveground structures, or materials being managed under other regulatory programs.

With regard to U. S. EPA's other areas of concern, as identified in references 5 and 6, namely product inventories, drummed waste, and underground storage tanks (USTs), the DOE agrees that it must evaluate potential releases associated with these sources and undertake any necessary response actions. Because these areas were not included within the original work plan, substantial coordination and integration of CERCLA, waste management, decontamination and decommissioning activities are required to assess and if needed, to remediate current or potential sources of releases associated with these areas. DOE will ensure discussions of this integration are incorporated into the OU 3 RI/FS documentation.

Your disapproval raises other issues that must be resolved in order to proceed with the Feasibility Study (FS) process. Those issues are described below:

- Development of alternatives and screening process
- Point of compliance for perched water aquifer and clean-up level
- Soils clean-up level
- Treatability studies schedules
- Additional level of effort (scope, budget, and schedule impact) required to complete site characterization
- Outfall line investigation and proposed plan
- Structural analysis of production area buildings and mechanical properties of soil underneath (scope, budget, and schedule impact)

The DOE recommends scheduling an informal dispute conference to discuss/resolve these issues in Chicago on January 22 - 23, 1991.

The DOE invokes the provisions of Section XIV, Resolution of Dispute, with respect to Region V's assessment of stipulated penalties under the Consent Agreement. EPA's assessment of stipulated penalties is inconsistent with the purpose of the model provisions negotiated between our agencies and incorporated in the 1990 Consent Agreement. In negotiating the model language of the Stipulated Penalties provision, DOE and U. S. EPA agreed that the language "fails to comply with a term or condition of this Agreement which relates to a removal or final remedial action" refers to a failure on DOE's part during the implementation stage of a cleanup under an agreement. The model language is not a broad authorization to assess stipulated penalties concerning alleged failures in the investigative stage of activities under an agreement except for the failure to submit primary documents in accordance with the schedules specified in the Consent Agreement. In this case, DOE submitted the primary document on schedule. The model Stipulated Penalties

provision is not authorization to assess penalties for unanticipated technical difficulties in the RI/FS.

DOE negotiated the 1990 FMPC Consent Agreement in good faith with the U. S. EPA. In doing so, however, it entered into the Agreement in advance of the statutory mandate for entering an interagency agreement. As you know, Section 120(e)(2) of CERCLA requires federal agencies to enter into interagency agreements such as this within 180 days after completion of the Remedial Investigation and Feasibility Study (RI/FS). The purpose of the Agreement is to facilitate "expeditious completion...of all necessary remedial action." EPA's use of stipulated penalties in this matter is without foundation in the statute and is particularly inappropriate when considering the language of Section 120, DOE's good faith in entering into an agreement before it is required by the statute, and the negotiated scope of the model provision.

This constitutes a written statement of dispute pursuant to Section XIV, Resolution of Dispute, regarding the disapproval of the ISA Report (Reference 5), the NOV (Reference 6) and the proposed assessment of stipulated penalties for the Operable Unit 3 ISA Report. The DOE proposes to U. S. EPA to enter into informal dispute resolution for those technical issues raised on the ISA Report and proposes to proceed immediately with the formal dispute on the stipulated penalties assessment and scope of work issues. We recommend a teleconference at mutual convenience for the formal dispute resolution.

Sincerely,



Gerald W. Westerbeck  
FMPC Site Manager

cc:

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